RECENT DEVELOPMENTS

THE USE OF THE VOID-FOR-VAGUENESS DOCTRINE TO INVALIDATE STATE LOYALTY OATHS

Baggett v. Bullitt
377 U.S. 360 (1964)

Following the Supreme Court's dismissal of *Nostrand v. Little*[1] for want of a federal question and the dissolution of an injunction staying the enforcement of a loyalty oath requirement, the President of the University of Washington issued a memorandum to all university employees notifying them of their obligation to take an oath of allegiance.[2] The faculty was required to subscribe Oath Form A[3] and the staff (other than faculty) to

[1] 368 U.S. 436 (1962). One of the challenged oaths was the subject of prior litigation involving two of the plaintiffs in the instant case. Professors Nostrand and Savelle had previously attacked the 1955 oath and succeeded in having one severable section declared unconstitutional. After remanding for a determination that the plaintiffs would be entitled to a hearing if dismissed for failure to take the oath, the Supreme Court granted the Attorney General's motion to dismiss for want of a substantial federal question.

[2] The president based his authority to require oaths on the amended Subversive Activities Act, Wash. Rev. Code § 9.81.070 (Supp. 1956), and the Code of Public Instruction, Wash. Rev. Code §§ 28.70.150, 28.76.230 (1951). The Office of the Attorney General provided two approved forms of oath. Oath Form A, *infra* note 3, is composed of two sections; the first is an oath to support the constitution and the second is a loyalty oath. The first section, required only for teaching personnel, has been in effect since 1931 and is therefore intermittently referred to as "Oath Form A" or the "1931 oath" both by the Court and in the body of this comment. The second section, the loyalty oath, is obligatory for staff as well as teaching faculty and is based upon a 1955 amendment to the Subversive Activities Act. This section is intermittently referred to as "Oath Form B" or the "1955 oath." See Record, pp. 15-16, Baggett v. Bullitt, 377 U.S. 360 (1964).

[3] Oath Form A

STATE OF WASHINGTON

Statement and Oath for Teaching Faculty of the University of Washington

I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

I further certify that I have read the provisions of RCW 9.81.010(2), (3), and (5), RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

subscribe Oath Form B.[4] All state employees had to affirm that they were not "subversive" [5] or members of a "subversive organization" [6] or "foreign subversive organization." [7] As a result, sixty-four members of the faculty, staff, and student body of the University of Washington brought a class action for a declaratory judgment on the constitutionality of the two oaths and for an injunction against enforcement of the statutes which supported the oaths by the President of the University, members of the Washington State Board of Regents, and the State Attorney General.

A three-judge district court held that the 1955 oath—Oath Form B—and underlying statutory provisions (which applied to all state employees) did not infringe upon first and fourteenth amendment freedoms and were not unduly vague. The 1931 oath—Oath Form A—which applied only to teachers, was not examined because the Washington state courts had not yet interpreted it; the district court abstained from examining the oath and denied the request for a permanent injunction.[8] The Supreme Court noted probable jurisdiction "because of the public importance of this type of legislation and the recurring constitutional questions that are presented by it." [9]

In an opinion by Mr. Justice White, the United States Supreme Court declared that the oath required by the 1955 statute was lacking in "terms susceptible of objective measurement" and was unconstitutionally vague because of the wide scope of its possible application. It could, for example be used to prosecute editors of scholarly magazines who analyze manuscripts of Communist scholars, or teachers whose students are Communists. Oath Form A was also held to be unconstitutionally uncertain because it provided no ascertainable standard of conduct and because the statute operated to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. Its terms, even narrowly construed, abutted upon sensitive areas of basic first amendment freedoms. If enforced, the oath could prevent a professor or teacher from joining any group opposing any current public policy or law or from even criticizing the state judicial system.

The Court concluded by asserting that the abstention doctrine, requiring a federal court to allow state courts to determine issues of state law prior to federal adjudication, was not an automatic rule but involved the discretionary exercise of a court's equity powers. The determination of the validity of the 1931 oath prior to its interpretation in state courts was justified by stating: "We doubt . . . that a construction

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I understand that this statement and oath are made subject to the penalties of perjury. . . .

Baggett v. Bullitt, *supra* note 2, at 364 n.3 *Cf.* Wash. Rev. Code § 28.70.150 (1931).

[4] Oath Form B is essentially the same as Oath Form A except that the first paragraph is omitted. *Supra* note 2.

[5] Wash. Rev. Code § 9.81.010(5) (1956).

[6] Wash. Rev. Code § 9.81.010(2) (1956).

[7] Wash. Rev. Code § 9.81.010(3) (1956).

[8] Baggett v. Bullitt, 215 F. Supp. 439 (1963).

[9] Baggett v. Bullitt, 375 U.S. 808 (1963).

of the oath provisions . . . would avoid or fundamentally alter the constitutional issues raised in this litigation." [10]

The importance of this case is not to be found simply in the fact that phrases such as "[lend] aid, support, advice or influence to the Communist Party" and "promote respect for the flag and the institutions of the United States of America and . . . undivided allegiance to the government of the United States" are incapable of providing ascertainable standards of conduct or that they are composed of terms that are not susceptible of objective measurement. The use of the void-for-vagueness doctrine to decide the constitutional issue, the general subject matter of the statutes, and the modification of the scienter requirement in loyalty oath cases combine to give this decision far-reaching effects.

In deciding that the loyalty oaths required by the state of Washington were "unduly vague, uncertain and broad," the Court again bypassed a direct examination of the constitutionality of loyalty oaths for teachers.[11] Since *Adler v. Board of Educ.*[12] it has been recognized that the states have the right to establish qualifications for teacher employment. However, the Court in *Sweezy v. New Hampshire*[13] clearly acknowledged academic freedom as a constitutionally protected right embodied in the free speech guarantee of the first and fourteenth amendments. In four post-*Sweezy* loyalty cases the Court has not reconciled the free speech needs of academic freedom with a state's right to prevent subversives from adversely influencing students.[14] The Court has shown an awareness of the fact that oaths can inhibit people from speaking or teaching freely; therefore, it has required that the oaths meet extremely strict standards of clarity as a means of protecting this freedom of speech. These new standards involve both the concept of "guiltless knowing behavior" and terms "susceptible of objective measurement." Exactly what these standards require is not yet clear, but their application is certain to have a significant effect on the void-for-vagueness doctrine as applied to statutes which may inhibit first amendment freedoms and on loyalty oaths in general.

It has long been recognized that the void-for-vagueness doctrine or the doctrine of unconstitutional uncertainty is inherently perplexing. "A judgment that a statute does or does not provide the required definiteness is necessarily subjective." [15] The doctrine is of comparatively recent origin; [16] the first statute found to be void for vagueness appeared before

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[10] Baggett v. Bullitt, 377 U.S. 360, 375 (1964).

[11] See Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

[12] 342 U.S. 485 (1952).

[13] 354 U.S. 234 (1957).

[14] See Elfbrandt v. Russell, 378 U.S. 127 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, *supra* note 11; Shelton v. Tucker, 364 U.S. 479 (1960). See Morris, "Academic Freedom and Loyalty Oaths," 28 Law & Contemp. Prob. 487, 490-510 (1963).

[15] Collings, "Unconstitutional Uncertainty—An Appraisal," 40 Cornell L.Q. 195 (1955).

[16] Collings, *supra* note 15; Note, "Due Process Requirements of Definiteness in Statutes," 62 Harv. L. Rev. 77 (1948). See generally Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960).

the Court in 1914.[17] Starting at that time and continuing into the early 1930's, the only statutes declared unconstitutionally vague were those in which the statutory language was so obscure that it failed to give adequate warning and to provide proper standards for adjudication;[18] this was held to be a violation of procedural due process of law.[19] In 1931 the Court first held a statute to be unconstitutionally uncertain because the language was so broad and sweeping that it prohibited conduct protected by the Constitution; it classified this as a violation of substantive due process.[20] In the cases that followed,[21] as in the principal case, no definite standards, no meaningful criteria, were established by which the legislature could "measure" the vagueness of a statute. Mr. Justice Frankfurter succinctly stated the problem:

> "[I]ndefiniteness" is not even a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as "indefiniteness" in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained.[22]

The requirement of extra specificity in statutes which may infringe upon first amendment freedoms is well established and frequently applied.[23] It is used to create a buffer-zone to protect the individual freedoms guaranteed by the first amendment. The importance of free speech as a means of making the government responsive to the will of the people and of securing social changes in a lawful manner has given it a preferred position in relation to all other freedoms. In *Cramp v. Board of Pub. Instruction*,[24] as in the principal case, the Court indicated that these freedoms need "breathing space" and then supplemented the existing requirements with an order that all oaths which may affect free speech must be composed of terms susceptible of objective measurement.

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[17] International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

[18] See, *e.g.*, United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921) ("the section forbids no definite or specific act."); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . ."); Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927) (statutes must be framed "so that those to whom they are addressed may know what standard of conduct is intended to be required."); Champlin Ref. Co. v. Commission, 286 U.S. 210, 243 (1932) ("the exaction of obedience to a rule or standard that is so vague and indefinite to be really no rule or standard at all.").

[19] See Collings, *supra* note 15, at 196-97.

[20] See Stromberg v. California, 283 U.S. 359, 369 (1931) ("might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitation.").

[21] See Cramp v. Board of Pub. Instruction, *supra* note 11; Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937).

[22] Winters v. New York, *supra* note 21, at 524 (dissenting opinion).

[23] See Cramp v. Board of Pub. Instruction, *supra* note 11; Smith v. California, 361 U.S. 147 (1959); Stromberg v. California, 283 U.S. 359 (1931); see also Collings, *supra* note 15, at 218-19; Note, 109 U. Pa. L. Rev. 67, 75 (1960).

[24] 368 U.S. 278 (1961).

The Court has not disclosed exactly what this new requirement means. In *Cramp* the suggestion was made that "advocacy of violent overthrow of state or federal governments" and "membership or affiliation with the Communist Party" would be acceptable terms,[25] but in *Baggett v. Bullitt*[26] the only additional clarification given was that the "measures which purport to define disloyalty must allow *public servants to know* what is and what is not disloyal."[27] By examining the phrases that the Court in *Baggett* found to be vague[28] and comparing them with the two permissible

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[25] *Id.* at 286.

[26] 377 U.S. 360 (1964).

[27] *Id.* at 380. (Emphasis added.)

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THIS STATUTORY LANGUAGE	MIGHT BE USED TO PROSECUTE ANYONE WHO:
I "Subversive person" means any person who teaches any person: 1. to commit any act intended to overthrow the government by revolution, force or violence. 2. to attempt to commit any act to overthrow the government by revolution, force or violence. 3. to aid in the commission of any act to overthrow the government by revolution, force or violence. See Wash. Rev. Code § 9.81.010(5) (1956).	a. teaches or advises known members of the Communist party. b. by his teaching or advice may now or at some future date aid the activities of the party. See 377 U.S. 360, 367-68 (1964).
II Revolution, force and violence...	advocates peaceful but far-reaching constitutional amendments, repeal of the twenty-second amendment, or participation by this country in a world government. *Id.* at 370.
See Wash. Rev. Code § 9.81.019 (2) (1956).	
III I will by precept and example promote respect for the flag...	a. refused to salute the flag or advocated refusal because of religious beliefs. b. criticised the design or color scheme of the flag. c. unfavorably compared it with that of a sister state or foreign country. *Id.* at 371.
See Oath Form A, *supra* note 3.	
IV . . . and the institutions of the United States of America and the State of Washington.	criticized his state judicial system, or the Supreme Court or the institution of judicial review. It might be deemed to proscribe advocating the abolition of the Civil Rights Commission, H.U.A.C., or foreign aid.
Ibid.	*Id.* at 371.

phrases in *Cramp,* it is possible to arrive at a tentative determination of what constitutes "terms susceptible of objective measurement."

The common characteristics found in the acceptable phrases and absent in the unconstitutional phrases are that the conduct prohibited must be direct rather than indirect, and the terms used must, on their face, prohibit specific acts and no others. The conduct in which a teacher swears not to participate must be *his* conduct. The state can, by means of an oath, prevent *A* from teaching if *he* advocates the violent overthrow of the government, but it cannot discharge him merely because his teaching is beneficial to another who advocates the overthrow of the government by force.[29] According to *Cramp* and *Baggett,* states can require *A* to swear that he is not a member of the Communist party but they cannot require him to swear that he will not knowingly teach, aid, or advise members of the Communist party.[30]

The terms of the oaths must be phrased in a manner that permits only narrow application. They may require or proscribe certain conduct only if the same phrases could not be used to prevent other, permissible conduct. The two impliedly adequate phrases suggested in *Cramp* prohibit actions that are objectively manifested and evident to everyone. Preventing *A* from joining the Communist party does not prevent his joining other groups which may be considered equally bad by some elements of society; proscribing advocacy of the violent overthrow of the government does not prevent *A* from teaching nuclear physics to a class of students, some of whom are known Communists. On the other hand, the Court in *Baggett* felt that phrases similar to "aid in the commission of any act to overthrow the government by revolution, force, and violence"[31] encompassed both protected and prohibitable conduct. The phrase includes advocacy of unlawful conduct, but it also includes constitutionally protected conduct such as advocating participation by the United States in a world government.[32] This double edge makes the statute an unacceptably dangerous weapon.

These extracted indicia are all the Court has given to clarify its new standard. If pursued, this criterion—that the terms of the oath must be "susceptible of objective measurement"—as used by the Court could successfully invalidate the teacher loyalty oaths required in thirty states.[33]

V I will promote undivided allegiance to the government of the United States.	a. gave lectures voicing far-reaching criticism of any old or new policy followed by the federal government. b. allied himself with any interest group dedicated to opposing any current public policy or law of the federal government.
Ibid.	*Id.* at 371-72.

[29] *Supra* note 28 at I.

[30] *Ibid.*

[31] *Supra* note 28 at II.

[32] *Ibid.*

[33] An excellent compilation of loyalty oaths and loyalty oath requirements can be found in Bryson, Legality of Loyalty Oaths and Non-Oath Requirements 53-94

The second standard imposed by the Court to obtain specificity in oath statutes was the concept of "knowing but guiltless behavior." [34] This involves the threat of a perjury prosecution for innocent conduct that the actor knows might be beneficial to the Communist movement. Mr. Justice Douglas, dissenting in *Nostrand v. Little*, described the application of this test in *Cramp* by stating that the oath "was unconstitutional, because it brought or might bring into its net people who, by parallelism of conduct, might be said to have given 'aid' to the Communist Party though the cause they espoused was wholly lawful." [35] Thus if a professor or administrator invited a Communist scientist or scholar to the United States as a visiting professor and his invitation was viewed as being beneficial to the Communist party, sufficient grounds might exist for his dismissal or prosecution. Any phrase that is capable of being read in this manner must now be excluded from an oath. An example the Court gave was that the phrase "knowingly lent their 'aid,' or 'support,' or 'advice,' or 'counsel' or 'in-

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(1963). A survey of the oaths in the statutes of thirty-nine states discloses no additional terms that would clearly survive the "objective measurement" test. A few states require oaths that incorporate only the accepted phrases; an example is the Kansas oath, Kan. Gen. Stat. Ann. § 21-305 (1949):

> I, ... swear (or affirm) that I do not advocate, nor am I a member of any political party or organization that advocates the overthrow of the government of the United States or of the state by force or violence; and that during such time as I am an officer or employee of the ....., I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States or of this state by force or violence.

On June 15, 1964, in a per curiam decision, the Supreme Court vacated a judgment of the Supreme Court of Arizona and remanded its interpretation of a teacher loyalty oath for further consideration in the light of the principal case. The oath remanded in Elfbrandt v. Russell, *supra* note 14, is as follows:

> I, ...do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ..... according to the best of my ability, so help me God (or so I do affirm).

Ariz. Rev. Stat. Ann. § 38-231(G) (Supp. 1964).

[34] This phrase was first used by the Court in Cramp v. United States, *supra* note 11: "While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally *guiltless knowing behavior*." *Id.* at 286. (Emphasis added.) In Baggett v. Bullitt, *supra* note 26, the Court said: "The susceptibility of the statutory language to require foreswearing of an undefined variety of *'guiltless knowing behavior'* is what the Court condemned in *Cramp*. This statute, like the one at issue in *Cramp*, is unconstitutionally vague." *Id.* at 368. (Emphasis added.) It was used for a second time in *Baggett* at 373: "The hazard of being prosecuted for *knowing but guiltless behavior* nevertheless remains." (Emphasis added.)

[35] *Supra* note 1, at 437.

fluence' to the Communist Party" [36] might be applied to a person who cast his ballot for a Communist party candidate or a candidate supported by the Communist party; to a lawyer who represented and gave legal counsel to a known Communist, or to a journalist who defended the constitutional rights of members of the party.[37] If the phrase could conceivably be applied in this manner it must be excluded because

> the hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human."[38]

If a statute meets the "objective measurement" test as analyzed and developed above it would also satisfy the conditions imposed by the concept of "guiltless knowing behavior." Both standards operate to require greater specificity in loyalty oath statutes; yet they are not redundant. The former can be used to test phrases or individual words such as "allegiance," "revolution," or "institutions"; the latter concentrates on the meaning of phrases as they might possibly be applied by a school official or state prosecutor. In addition, there are indications that the concept of "guiltless but knowing behavior" might be used by the Court as a tool for modifying the requirement of scienter in all loyalty oath cases.

Scienter, or knowledge of the nature of the offense, is one of the due process requirements of loyalty oaths that prevents state authorities from arbitrarily punishing innocent conduct. Before an affiant can be prosecuted for subversive activity he must have had a conscious intent to be a part of such activity; [39] before he can be discharged because of membership in a subversive organization it must be shown that he had knowledge of the nature and purpose of the organization.[40] If scienter were not an essential element, a teacher or other state employee could be discharged because of innocent and unknowing conduct or for mere association with known subversives.

The scienter requirement, implied in the early loyalty oath cases,[41] became express when in *Wieman v. Updegraff* the Court held that "indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." [42] The recent cases, *Cramp* and *Baggett,*

[36] This example was used by the Court in Cramp v. United States, *supra* note 11, at 286; it was repeated in *Baggett, supra* note 26, at 367-68.

[37] The fact that these examples include professions other than teaching might be an indication that the Court will take a closer look at the oaths required for attorneys, labor organization officers, and candidates for public office.

[38] Baggett v. Bullitt, *supra* note 26, at 373.

[39] See, *e.g.*, Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

[40] *Id.* at 190.

[41] See Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

[42] 344 U.S. 183, 191.

have refined "knowing activity" into "knowing but guiltless behavior" and "knowing, guilty behavior." The Court's previous indications that knowledge of the purpose of the organization or nature of the activity would satisfy the scienter requirement have now been modified. Knowledge by itself is insufficient; exactly what else is required is not yet clear. A new concept, which combines the "specific intent" necessary for criminal prosecution that was required by the Court in *Dennis v. United States*[43] with the element of "activity" formulated in *Scales v. United States*,[44] seems to be emerging. Although the Smith Act cases[45] are not controlling in loyalty oath cases, the nature of the activity proscribed and the similarity of statutory language[46] present comparable problems. Individual liberties are protected in the former by requiring the government to show that the person charged had knowledge of the nature of the activity, that he had a specific intention to engage in it, and that he had actually carried out his intention. These safe-guards were read into the statute because of the possibility of imprisonment and severe fines. In the latter group it was necessary to show only that the affiant had knowingly participated in an activity or an organization that was "subversive." This was justified by asserting that public employment was not an absolute right and by granting the state the right to establish reasonable conditions of employment. However, an awareness by the Court of an increased number of "vigilance committees,"[47] the possibility of loss of reputation and profession,[48] and the inhibiting effect of oaths on legitimate conduct and speech has resulted in the present modification of the loyalty oath scienter requirement.

The concept that the Court is developing is negative in application and indefinite in scope. An oath, to be valid, must be so phrased that the language does not require the foreswearing of an undefined variety of

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[43] 341 U.S. 494 (1951).

[44] 367 U.S. 203 (1961).

[45] See Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, *supra* note 44; Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, *supra* note 43.

[46] The similarity of the legislative language can be vividly seen by comparing § 2 of the Smith Act, 18 U.S.C. § 2385 (1958), which provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence . . . .

with Wash. Rev. Code § 9.81.010(5) (1956):

> "Subversive person" means any person who commits . . . or advocates, abets, advises or teaches by any means any person to commit . . . any act intended to overthrow . . . the constitutional form of the government of the United States, or of the state of Washington . . . by revolution, force, or violence. . . .

[47] In Cramp v. United States, *supra* note 11, at 286-87, the Court recognized this influence when it observed: "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human." It repeated this statement in *Baggett, supra* note 26, at 373. See also Morris, *supra* note 14, at 500.

[48] See Baggett v. Bullitt, *supra* note 26, at 372.

guiltless knowing behavior.[49] This can presently be accomplished by restricting the proscribed conduct to specific acts objectively manifested[50] that are within the knowledge of the affiant at the time the oath is executed. But if legislatures are forced to frame their oaths with narrow particularity, "too easy opportunities are afforded to nullify the purposes of the legislation." [51] Rather than an attestation of loyalty, the oath becomes an affidavit that specified acts have not been and will not be committed. If an oath is restricted to the two phrases that met with the Court's approval in *Cramp*, it would include only those acts made criminal offenses under the Smith Act. As such, it would be an ineffective means of preventing the subtle and persistent influence a subversive teacher could have on the formative minds of his students. A suggested alternative method of creating a valid oath would be to recognize the possibility that aid might be given to the Communist party or other subversive elements by acts that are otherwise innocent, and to import a requirement of something more than knowledge and action by the affiant.

The alternative of requiring a new element in addition to knowledge and action involves ascertaining what is necessary to change guiltless knowing behavior into guilty knowing behavior. The Court has indicated that knowledge of the benefit to subversives by the commission of an act is insufficient:

> The Washington Supreme Court has said that knowledge is to be read into every provision and we accept this construction. . . . But what is it that the Washington professor must "know"? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he knows that his aid or teaching would or might be useful to others in the commission of acts intended to overthrow the Government? [52]

An indication of what may be required is found in a footnote by the Court to the principal case. Mr. Justice Clark, dissenting, pointed out the similarity of the critical language used in the Smith Act and Oath Form B.[53] The majority answered this assertion by stating:

> It is also argued that § 2 of the Smith Act . . . upheld over a vagueness challenge in *Dennis v. United States* . . . proscribes the same activity in the same language as the Washington statute. The argument is founded on a misreading of § 2 and *Dennis v. United States*. . . .
> In connection with the vagueness attack, it was noted [in *Dennis*] that "[t]his is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. . . ." [54]

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[49] *Id.* at 368.

[50] See text accompanying notes 25-33 *supra*.

[51] Winters v. New York, *supra* note 21, at 525 (dissenting opinion).

[52] Baggett v. Bullitt, *supra* note 26, at 369.

[53] *Id.* at 383 (dissenting opinion); see note 46 *supra*.

[54] *Id.* at 370 n.8.

The similarity of the language is crucial and cannot be denied. In *Dennis* the Court had a power of interpretation that it did not have in the principal case. In *Dennis* the Court could add another element that it could not supply by interpretation in *Cramp* and *Baggett,* and it did so when it held that

> the structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime *proof of the intent* of those who are charged with its violation to overthrow the Government by force and violence.[55]

The inclusion of specific intent as an essential element was sufficient to safeguard the liberties of an individual charged with a criminal offense. Since loyalty oaths are not criminal in nature it is conceivable that something more than knowledge but less than criminal intent would be adequate to protect the affiant's rights and still provide an effective means for the State to insure the loyalty of its teachers and employees.

One element that meets both of these requirements is proof of the affiant's *motive* for his conduct.[56] Proof of what induced a person to commit an act that was beneficial to the Communist party or might aid in the forceful overthrow of the government would not be as difficult to establish as specific intent and would significantly reduce the possibility that a teacher might be discharged for knowing but guiltless conduct. If it could be shown that the motives of a professor who participated in an international convention and exchanged views with Communist scholars or who invited visiting professors from Communist countries were inconsistent with the professional standards of the academic community, the State would be justified in discharging that professor.

Professors, teachers, or other state employees—who, while acting within the legitimate scope of their employment, knowingly aid the Communist cause—would be conscious of the need to act reasonably and with justifiable motives. This might enable a social science professor to join an organization known to be subversive in order to study its operations, but it would arguably not allow a mathematics professor to join for the same reason; the nature, necessity, and circumstances of the activity become as important as the activity itself. A specific controversial act itself would not be sufficient grounds for dismissal. Other factors,

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[55] Dennis v. United States, *supra* note 43, at 499. (Emphasis added.)

[56] *Cf.* Black, Law Dictionary 1164 (4th ed. 1951):

> In the popular mind intent and "motive" are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act.

such as whether or not there is an academic justification for the act, how often it was repeated, what the effect of the act was, become equally important. At the initial oath-taking stage the affiant would not be required to foreswear any specific conduct. He would be required to affirm that he would act in a manner consistent with academic or professional standards and the burden would be on the state or university officials to show that the conduct was undesirable and was not academically justifiable. This new requirement would be a modicum of pressure exerted upon state employees to prevent unnecessary benefits from accruing to the Communist party and undue subversive influences from being exerted upon impressionable students. Proof of the affiant's motive is a compromise between the needs of the individual and the needs of the state—to require less would be to inhibit innocent but knowing conduct; to require more would be to deny to the state the right to establish loyalty as an effective qualification for employment—and the Court has not denied that the state has a valid interest to protect nor that it can protect this interest by means of a loyalty oath.[57]

[57] The requirement of the new element of "motive" in loyalty oath cases would be consistent with the otherwise hasty disposition of the arguments for abstention in the principal case. Normally a federal court will not pass on the constitutionality of an uninterpreted state statute. Adler v. Board of Educ., *supra* note 41, at 496. The Court's reason for doing so in *Baggett* was its belief that a construction or interpretation of the oath provisions could not avoid or fundamentally alter the constitutional issue. Undoubtedly the state court would not have implied the element of "motive" postulated herein, and the alternative of extreme specificity could not have been readily provided by the state. The Court observed that, "It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. *Abstention does not require this.*" Baggett v. Bullitt, 377 U.S. 360, 378 (1964). (Emphasis added.) Where, as here, no state court ruling could settle the federal questions that would necessarily remain, and the likelihood existed that the oath would again be before the court on the identical issue herein decided, abstention would not be justified. *Id.* at 379. See also Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 463 (1943).